



STATE OF CALIFORNIA
FAIR POLITICAL PRACTICES COMMISSION
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January 12, 2015

Heather Lenhardt
Deputy City Attorney
City of Capitola
Law Offices of Atchison, Barisone,
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P O Box 481
Santa Cruz, CA 95061

Re: Your Request for Advice
Our File No. A-15-230

Dear Ms. Lendhart:

This letter responds to your request for advice on behalf of Councilmember Michael Termini regarding the conflict of interest provisions of the Political Reform Act (the "Act").¹ We are not a finder of fact when rendering advice (*In re Oglesby* (1975) 1 FPPC Ops. 71), and any advice we provide assumes your facts are complete and accurate. We are only providing advice under the conflict of interest provisions of the Act and not under other general conflict of interest prohibitions such as common law conflict of interest or Section 1090.

QUESTION

Does Councilmember Termini have a conflict of interest under the Act that prohibits him from participating in decisions regarding the City of Capitola's potential new skate park?

CONCLUSION

Yes. Councilmember Termini may not participate in decisions related to the skate park.

FACTS

You are the city attorney for the City of Capitola. The city council will be making decisions regarding approving the building of a new local skate park and related permits (the "Project"). The Project is proposed to be built on city-owned land. The applicants are two private individuals, and a draft environmental impact report has been completed and is out for review.

¹ The Political Reform Act is contained in Government Code Sections 81000 through 91014. All statutory references are to the Government Code, unless otherwise indicated. The regulations of the Fair Political Practices Commission are contained in Sections 18110 through 18997 of Title 2 of the California Code of Regulations. All regulatory references are to Title 2, Division 6 of the California Code of Regulations, unless otherwise indicated.

The Project will require approval of a design permit, conditional use permit, and a coastal development permit from the Planning Commission. Planning Commission decisions may be appealed to the City Council. The City Council would also need to approve a right-of-entry permit. If approved, the City and Applicants would enter into an agreement whereby Applicants would construct (using properly licensed contractors) the Project on the Monterey Park site, possibly via a lease-leaseback arrangement.

NHS Inc., a California corporation ("NHS"), has provided all the funding for the project thus far, and is currently the sole funder going forward.² NHS is a manufacturer and distributor that has been in business since 1973. NHS' main products include skateboard decks, trucks, wheels, snowboards and surfboards, and related products, apparel and accessories. NHS' brand names include Santa Cruz Skateboards, Creature and Sonic Skateboards, Independent and Krux Trucks, Speed Wheels, Santa Cruz Classics, Titus Safety Gear, Santa Cruz Snowboards and Combine Snowboard Clothing. NHS distributes products worldwide. NHS is the one of the oldest company in the world dedicated to selling skateboards. It is unlikely that the development of a skate park in the City will contribute to the change in the value of NHS. Arguably, NHS' involvement in the skate park Project as a donor could generate additional good will to NHS and potentially increase local skateboard sales.

The Project Applicants, Tricia Proctor and Marie Mortorella, are directly linked to NHS, Inc. and its owner, Richard Novak. Ms. Proctor works for NHS as an assistant to Mr. Novak.

Councilmember Termini is the president and sole shareholder of Triad Electric, Inc., a closely held California corporation that conducts electrical contracting work. Triad Electric contracts and subcontracts for electrical installations on construction projects and also contracts to perform electrical repair and maintenance work on existing structures. Councilmember Termini has been a member of the City Council since December 2004.

In September 2015, Triad Electric performed electrical work for NHS. All of the Triad Electric invoices have been satisfied by NHS and, accordingly, in 2015; NHS has been a source of income to Triad Electric of approximately \$17,000. There is no indication that Triad Electric would contract for electrical work on the Project.

ANALYSIS

Section 87100 prohibits any public official from making, participating in making, or using his or her position to influence a governmental decision in which the official has a financial interest. A conflict of interest may arise only when it is reasonably foreseeable that the decision will have a material financial effect on the official or his or her immediate family that is distinguishable from its effect on the public generally. (Section 87103.)

Financial Interests

Investment in a Business Entity - Section 87103(d) provides that an official has a financial interest in any business entity in which the official has a direct or indirect investment of \$2,000 or

² Initial deposits total over \$850,000.

more. As the president and sole shareholder of the corporation, Councilmember Termini has a financial interest in Triad Electric as a business entity.

Source of Income - An official has an interest in any source of income, including promised income that aggregates to \$500 or more within 12 months prior to the decision. Also, if a public official owns a 10-percent or greater interest in his or her business, customers who are sources of income to that business are also considered sources of income to the public official. As stated above, NHS was a source of income to Triad Electric of approximately \$17,000. Because he is the sole owner of Triad, Inc., Councilmember Termini has an interest in NHS as a source of income of \$500 or more in the 12 months prior to the governmental decision. (Section 87103(c).)

Foreseeability and Materiality

Generally, a financial effect is presumed to be reasonably foreseeable if the interest is “explicitly involved” in a decision. An interest is “explicitly involved” in a decision if the interest is a named party in, or the subject of, a governmental decision before the official or the official’s agency. (Regulation 18701(a).) An interest “is the subject of the proceeding if the decision involves the issuance, renewal, approval, denial or revocation of any license, permit, or other entitlement to, or contract with, the financial interest . . .” (*Ibid.*) Moreover, for any interest in a business entity (including a business entity that is a source of income to the official) explicitly involved in the decision, the financial effect of the decision is deemed material pursuant to Regulations 18702.1(a) and 18702.3(a)(3). If the interest is “not explicitly involved” in the decision, a financial effect is reasonably foreseeable if the effect can be recognized as a realistic possibility and more than hypothetical or theoretical. A financial effect need not be likely to be considered reasonably foreseeable. (Regulation 18701(b).)

In this case, Triad Electric is not explicitly involved in the decisions regarding the Project. Because there is no indication that Triad, Inc. would be a contractor or subcontractor on the Project if the City approves it, it does not appear reasonably foreseeable that the decisions would have a material financial effect on Triad Electric based upon the facts provided.

Nonetheless, the pertinent question is whether NHS is explicitly involved in the decision. Based on the facts provided, the applicants are private parties directly linked to NHS and NHS has provided all funding for the project to date and fully intends to provide all future funding. The applicants are looking for other funding sources, but at this time, NHS is the sole source. Based on these facts, it appears that the applicants are acting on behalf of and in conjunction with NHS and that NHS is indeed a named party or subject of any proceeding involving the Project. Consequently, NHS is explicitly involved in the decision, and the financial effect of and decision on NHS is both foreseeable and material.

Because of the financial effect on his source of income, Councilmember Termini has a conflict of interest that prohibits him from making, participating in making, or using his position to influence decisions regarding the Project. There are no facts to suggest that the legally required exception (Regulation 18705) or public generally exception (Regulation 18703) would apply.

When a public official who holds an office specified in Section 87200 (such as a city councilmember) has a conflict of interest in a decision noticed at a public meeting, he or she must: (1) immediately prior to the discussion of the item, orally identify each type of economic interest involved in the decision as well as details of the economic interest on the record of the meeting; (2) recuse himself or herself, and (3) leave the room for the duration of the discussion and/or vote on the item. (Section 87105; Regulation 18707.)

If you have other questions on this matter, please contact me at (916) 322-5660.

Sincerely,

Hyla P. Wagner
General Counsel

A handwritten signature in black ink, appearing to read "Heather M. Rowan", with a long horizontal flourish extending to the right.

By: Heather M. Rowan
Senior Counsel, Legal Division

HMR:jgl